MARIAM BINTE AHAD v. ERNESTO A. GACAD & ANOR.

[O.C.J. (Roberts C.J.) October 4, 1984]

[Bandar Seri Begawan – Suit No. 37 of 1984]

Tort – Negligence – Fatal accident on bridge – 1st defendant pleaded guilty to charge – Liability – Apportionment.

Damages – Fatal accident – Deceased aged 30 employed as driver of refuelling lorry – Basic salary of $1,100 p.m. plus allowance – Quantum of damages.

Road Traffic – Fatal accident – Liability – Apportionment.

The deceased was killed on March 15, 1983 when his motorcar collided with a trailer drawn by a lorry driven by the 1st defendant, who was employed by the 2nd defendant. The accident took place on the bridge at Sungei Damuan. The plaintiff, widow of the deceased, brings against the defendants this action as the administratrix of her husband's estate on behalf of herself, the deceased's mother and her four children aged between 5 and 11. The plaintiff called no eye witnesses. Her only evidence consisted of the plan produced by Inspector Sipiang and an admission made by the 1st defendant in proceedings taken against him in the Magistrate's Court for careless driving to which he pleaded guilty.

The gist of the 1st defendant's defence was that he was driving at between 15 and 20 m.p.h. when he approached the bridge. He knew that his trailer would come over the centre line of the road on the bridge and that the oncoming vehicle would have to keep well over to its left, when it passed him, if it was to do so safely. He agreed that as his vehicle crossed the bridge, it encroached at least 6 inches over the centre line. As he crossed the bridge, he felt an impact and felt the trailer dragging the car along the road.

The deceased was aged 30 at the time of accident. He was employed as a driver and operator of a refuelling lorry at the International Airport by Brunei Shell Marketing, earning a basic salary of $1,100, plus a housing allowance of 25% and allowances of $200 – $250 per month. It was agreed that a multiplier of 14 was reasonable.

Held: (1) the prime cause of the accident was that the 1st defendant drove without due regard for other vehicles on the road by allowing his vehicle to veer into the wrong lane, knowing that he was in control of a wide and dangerous vehicle, and that it must encroach at least six inches over the centre line as he crossed the narrow bridge;

(2) the impact took place when that part of the trailer which struck the deceased's car was somewhat more than six inches across the centre line. It may be that the oncoming driver was misled by his concentration on the dipped headlights, so that he did not give sufficient attention to the warning light on the trailer. The 1st defendant was 75% liable for the accident and the deceased 25%;

(3) a total amount of $281,250, with costs, was awarded as damages, made up as follows:

(a) *pre-trial loss from death to judgment (18 months)*
Based on a monthly basic salary of $1,100, plus 25% housing allowance and other monthly allowance of $225 plus annual bonus of two months, this gives a figure of $1,600 x 18 + 1,100 x 3 (bonus = $32,100, to which must be added the profit from fishing of $1,920, making a total of $34,000. From this must be deducted expenses of $600 x 18 = $10,800, leaving a pre-trial loss of $23,200, rounded to $26,000 with funeral expenses of $2,750. Loss of expectation of life was agreed at $5,000. The total pre-trial loss is therefore $31,000.

(b) *lost years*

The deceased died in Grade 11 and would take a long time to reach Grade 9. $1,300 is taken as monthly basic salary, to which must be added 25% housing allowance plus other allowance of $225 per month. This amounts to $1,850 x 150 months (18 months taken into account for pre-trial loss) = $277,500, to which must be added the bonus of 12½ years (25 x $1,300) of $32,500 and fishing profit of (12½ years x $1,280) $16,000 totalling $326,000. From this must be deducted maintenance of $600 x 150 = $90,000, thus yielding a figure of $236,000, to which a sum of $24,000 should be added as the deceased's saving, giving a total of $260,000;

(c) *provident and retirement funds*

The award under the Provident Fund is $13,000 and under the Retirement Fund is $71,000, totalling $84,000;

(4) 25% ($93,750) must be deducted from the total of $31,000 + $260,000 + $84,000 = $375,000, leaving a figure of $281,250;

(5) the pre-trial amount of $19,500 will carry interest at 6% p.a. from death to judgment; and $3,750 for loss of expectation of life at 2% from the writ to judgment. No interest is awarded on the lost years award or the Provident and Retirement Fund awards;

(6) the amount awarded must be paid within 21 days.

Cases referred to:

(1) *Hollington* v. *Hewthorne & Co. Ltd.* [1943] 1 K.B. 587.
(2) *Stupple* v. *Royal Insurance Co. Ltd.* [1970] 3 W.L.R. 222.

CIVIL SUIT.

Choo Fah Seng for the plaintiff.
David Clidero for the defendant.

Cur. Adv. Vult.

Roberts C.J.: The plaintiff, Mariam binte Ahad, claims as the widow and administratrix of the Estate of Jurah bin Gani, who was killed in a motor accident on March 15, of last year. She brings this claim on behalf of herself, the deceased's mother and her four children who are now aged between 5 and 11.

The Collision

It is not disputed that the deceased, Jurah, was killed when his motorcar, registration number BC 2371, which he was driving along Jalan Tutong in the direction of Bandar Seri Begawan, at about 5.30 on the morning of March 15, collided with a trailer, BC 4566, drawn by a prime mover, which I will call a lorry, BB 8869, driven by the 1st Defendant, Ernesto Gacad, who was in the employment of the 2nd defendant, Sharikat Amanah Haji Abdullah.

At the time when the accident occurred, it was still dark and the surface of the road was dry. The accident took place on the bridge at Sungei Damuan, the measurements of which have given rise to some dispute. The roadway on the bridge and for a substantial distance each side of it, was divided down the middle by a broken white line.

On each side of this bridge, which was approximately 41 feet long, the road was straight for about 600 feet on the Bandar side and about 700 feet on the Tutong side.

The Bridge

There has been conflict as to the width of the Sungei Damuan bridge, where the accident occurred. According to a plan drawn by Inspector Sipiang, about half an hour after the accident, the distance between the railings on either side of the road is 20 feet. However, according to Mr. Escorna, who was called by the defendants, the width of the bridge from railing to railing is 21 feet 6 inches. He made this measurement on April 12, of this year. It is unfortunately not possible for this conflict to be resolved now, because alterations have been made to the bridge since April of this year, by the construction of a pavement along the inner side of each railing, and apparently, by some degree of widening so that the present width would not assist me to decide which of the two witnesses is correct.

In the event, it is not necessary for me to decide which of those calculations is correct, because I am satisfied that, at the moment of collision, the portion of the trailer which was struck by the motorcar was across the centre line on the wrong side of the road, whatever the width of the road at that point.

Plaintiff's Case

The plaintiff could call no eye witnesses as to what occurred and her only evidence consisted of the plan produced by Inspector Sipiang and an admission made by the 1st defendant.

The police plan was of some assistance to the plaintiff in the early stages of the trial, in that it showed a road which was only 20 feet wide, a width which would not have been able to accommodate the trailer, which was admitted on the pleadings, to be 10 feet wide. Allowing even a minimum amount of clearance on the near side of six inches, the trailer must, therefore, on that measurement, have been across the centre line at the moment of collision.

Also in favour of the plaintiff was an admission made by the 1st Defendant in proceedings which were taken against him in the Magistrate's Court. Initially, he was charged with dangerous driving causing death, but the charge was reduced to careless driving, to which he pleaded guilty.

Under the Evidence Ordinance, section 17, it is open to me to give such weight as I think proper to such an admission. Since it was a plea of guilty, it would also have been admissible at common law under the authority of *Hollington* v. *Hewthorne*,[1] though, as Mr. Clidero rightly pointed out, Denning L.J. observed in *Stupple* v. *Royal Insurance Co.*,[2] that a plea of guilty is not to be regarded as conclusive, and that it is open to the person who had pleaded to explain, in a subsequent civil trial, why he had done so.

The 1st defendant explained his reasons for having pleaded guilty, the main one being his belief that, it he were to plead guilty to the lesser charge, his chances of being sent to prison and of losing his licence would be greatly reduced, as indeed was the case.

Having heard the evidence of Mr. Bond, his legal adviser at the time, I am satisfied, however, that when he did plead guilty, he knew, because it had been explained to him by Mr. Bond, that the effect of pleading guilty was an admission of carelessness on his part.

It is, however, only fair to say that the agreed statement of facts to which he pleaded guilty does not indicate any particular form of carelessness. The 1st defendant merely pleaded guilty to a statement of facts which recited the collision without attempting to identify the reason for it. Because this statement is in such indefinite terms, I do not propose to give more than minimal weight to the plea of guilty.

Defendant's Case

The substantial evidence as to what occurred on that morning comes from the 1st defendant himself. I attach no weight to the evidence of Charanjeet Singh, who was a passenger with him in the cab, not because he was a dishonest witness, but simply because he appears to have been half asleep most of the time and to have seen very little.

The 1st defendant gave evidence that he carried out all the normal and proper checks on his vehicle before leaving that morning on his way to Seria. I accept this, and his evidence that the lights were in working order, the tyres were in proper condition and that he was driving at between 15 and 20 m.p.h. along Jalan Tutong when he approached the bridge.

He testified that when he was about 300 feet short of the bridge, he saw two lights in the distance coming towards him. His headlights were on low beam. He knew this road well. He had driven along it on a number of occasions. He knew that the bridge was a narrow one. He knew that his trailer, because of its unusual width, would come over the centre line of the road on the bridge, and that the oncoming vehicle would have to keep well over to its left when it passed him if it was to do so safely.

Nevertheless, he thought that there was room for the car and trailer to pass on the bridge. He agreed that as his vehicle crossed the bridge, it encroached at least six inches over the centre line. As he crossed the bridge, he felt an impact and felt the trailer dragging the car along the road. He thought the car was about three-quarters over the bridge when it hit the trailer.

The plan and the photographs taken half an hour later showing glass on the road can be said to lend some support to his estimate of where the collision occurred.

Findings

The lorry was 6 feet 8 inches wide, the trailer 10 feet wide. The lorry was 22 feet long, and was joined to a trailer, 40 feet long, about 35 feet of which was behind the prime mover, making a total length of 57 feet for lorry and trailer. The trailer, being 3 feet 4 inches wider than the lorry, abutted further into the road than the lorry, and it was the outside leading edge of the widest part of the trailer which the deceased's car struck.

It is obvious that somebody in charge of a vehicle of such size, on roads of limited width, is under a duty to maintain a very high degree of care in his driving. It is not for the driver of a vehicle of this size to enter a portion of road where there is a centre line, knowing that his vehicle is bound to extend beyond the centre line, unless he is satisfied that there is no danger of collision with an oncoming vehicle. Unfortunately, in this instance, I find that that is what the 1st defendant did.

His defence was that the oncoming vehicle was driving on parking lights and approached him at 60 m.p.h. I regard this as a gross exaggeration. Mr. Rennell, an expert called by the defendant, estimated the speed at which the car was travelling when it hit the trailer at about 25-30 m.p.h. He added that it would be very difficult to drive on side lights during the dark. I thus reject the 1st defendant's evidence, in so far as it suggests that the oncoming vehicle was being driven at 60 m.p.h. on side lights, and find that it was approaching at about 30 m.p.h. There is no evidence which I accept that the car was not being driven, as one would expect in the dark, on dipped headlights.

It was suggested that the deceased's car had suffered severe damage to its near rear side in another accident, and that as a result, either the lighting system was affected, or the steering became unreliable. Without wishing, in any way, to criticize counsel who has a very difficult task, not made easier by a factor which I will mention in a moment, the motor vehicle examiner, who did examine the car shortly after the accident, was not asked whether any of these alternative explanations would have been possible.

The widow, who was recalled to give evidence on this point, testified that when the car left the house that morning, shortly before the accident, it was in an undamaged condition. Although Mr. Rennel thought that it was unlikely that the damage found at the rear of the car had been caused by the collision with the trailer, I am driven to the conclusion, in the absence of any other significant evidence which I can accept, that the injury to the near rear side of the car was also sustained immediately after the impact with the trailer.

I think this is an appropriate point to mention the grave difficulties which are caused to legal advisers, if the Police and the Land Transport Department are unwilling, as I am told it happens sometimes, to release to them copies of motor vehicle examination reports and plans of the

scenes of motor accidents which are the subject of civil litigation. Unless these reports and plans are made available to legal advisers well before the trial of an action, they cannot properly prepare their own cases or know the case which they have to meet. Not only does this make the conduct of proceedings difficult on the day, it reduces the possibility of settlements. I hope that arrangements can be made for copies of plans and reports dealing with motor accidents where litigation is in prospect, to be made available to legal advisers.

I have, therefore, come to the conclusion that the prime cause of this accident was that the 1st defendant drove without due regard for other vehicles on the road by allowing his vehicle to veer into the wrong lane, knowing that he was in control of a wide and dangerous vehicle, and that it must encroach as he crossed the narrow bridge.

I have to consider, however, whether the straying across the centre line of this monster absolved the oncoming driver from all responsibility for the accident which unhappily occurred.

The 1st defendant's evidence, as I have said, contained an admission that his vehicle encroached at least 6 inches over the centre line. He combined this with a comment that the left hand near side of his trailer was only 6 inches from the railing, which distance he was able to check through the near side front mirror.

It was suggested that when he conceded that his vehicle encroached at least 6 inches over the centre line, he must have been talking about the extent to which the lorry cab, not the trailer, extended across the centre line. Although my note is in equivocal terms, I think he must have been referring to the trailer, in view of his insistence that the near side of the trailer was never more than 6 inches from the railing. Not without some hesitation, because there is always an element of guess work in an attempted reconstruction of this kind, I find that the impact took place when that part of the trailer which struck the deceased's car was somewhat more than 6 inches across the line, though not a great deal more. It follows from this that the oncoming car would have had a reasonable amount of room in which to pass the trailer safely. It may be that the oncoming driver was misled by his concentration on the dipped headlights, so that he did not give sufficient attention to the warning light on the trailer which was about 25 feet behind the cab, but this can be no more than speculation.

I do not subscribe to the extreme view that because an oncoming vehicle has drifted over the centre line of a road, and a collision results, the encroaching vehicle must necessarily be held wholly responsible for the accident which follows. I think that a measure of responsibility, in these circumstances, lies on the oncoming car to take proper precautions for its own safety and that the deceased unfortunately failed to take such steps as were open to him to pull well to his left. He has, therefore, contributed in some degree to the accident which occurred.

The apportionment of blame is always a matter of guess work, but I estimate that the oncoming lorry was 75% to blame and the car was one-quarter to blame.

Damages

The deceased was aged 30 at the time of accident. He was employed as a driver and operator of a refuelling lorry at the International Airport by Brunei Shell Marketing.

The Manager of Brunei Shell Marketing, Mr. Syed Ahmad, in his lucid and helpful evidence, thought that the deceased would have continued to be employed in this capacity until he reached the age of 55. Redundancy was unlikely and the deceased's health had been good. Counsel on both sides agreed that, in these circumstances, a multiplier of 14 was reasonable, which I adopt.

Pre-trial loss

In assessing the pre-trial loss of the deceased, I find that his basic salary was $1,100, plus a housing allowance of 25% and overtime and shift allowance, which averaged betweeen $200-$250 a month, so I will take $225. In addition, he was entitled to an annual bonus of two months of his basis salary. This gives a total, for the period from death to judgment, which I will take as 18 months of $1,600 x 18 ($28,800) + $3,300 (bonus for three months) = $32,100.

In addition, there was evidence from the widow that the deceased had earned some money from fishing. According to her, he made about 8 fishing trips a month, on each of which he secured about 10 katies of fish, that is 80 katies a month; he fished for about nine months in a year. At first she said that he sold the fish for $5-$6 per kati, though later she agreed that some of it was sold for as little as $3.50. I will take a figure of $4 a

kati. And 80 katies a month, or $320 a month x 9 = $2,880. From this have to be deducted, the expenses of the boat, which she said were $50 a month; the expenses of petrol, which I thought she said were $50 a trip, but I think she meant $50 a month, and $400 a year for nets. That leaves a balance of $1,280 a year as the profits from month to his mother, used $30 a month for 18 months.

From this total of $34,000 for loss of earnings before trial, I have to deduct the amount which I find was expended on his own maintenance. According to the widow, about $100 of what he handed her for the household was spent on food for him. He spent $120 a month from lunches while he was at work. He gave $100 a month to his mother, used $30 a month for smoking. She said he spent $250 a month on petrol, which I think is too high, because it could give something like 4,000 miles a month of motoring with a small car. For that I have allowed $150, and $100 for other personal expenses of a varied nature including the other expenses of his car.

That adds up to $600, which is what I will deduct for his maintenance. Deducting 18 x $600 = $10,800 leaves pre-trial loss at $23,200.

Lost years

Looking now at the post-trial income, a multiplier of 14 gives 168 months; of which 18 have been taken into account in pre-trial loss. There is thus a multiplier of 150 for post-trial income. In attempting to assess this, some assessment has to be made of the likelihood of the deceased being promoted above the grade in which he was working in Brunei Shell Marketing.

At the time of his death, he was a Grade 11 worker earning, as I have said, a basic salary of $1,100. Mr. Syed Ahmad was of the opinion that it might take him another ten years to get to Grade 10 and, if his performance was average, that it might take another 10 years to get to Grade 9. I am prepared to assume for the purpose of my calculations that he would have reached Grade 9.

However, as he died in Grade 11, and it would have taken him these long periods to reach 10 and then 9, I am going to calculate the post-trial income on Grade 10, which is a very rough averaging out of the 25 years of his career which remained. I am going to take a figure of $1,300 per month basic salary, which is very roughly half way up the Grade 10 scale. To this must be added 25% housing allowance and the overtime and shift allowance which I will continue to assess at $225 per month. That amounts to $1,850 a month x 150 = $277,500. To this I have to add the bonus, which is for 12½ years 25 months' salary at $1,300, which is $32,500 which gives $310,000. I will add the fishing at 12½ x 1,280 which is rounded up $16,000. From this total of $326,000, I deduct his maintenance at the same figure of $600 per month x 150 = $90,000. This gives a total of $236,000.

There is no evidence from the widow, who was the only possible source, as to any savings that the deceased might have had. I think that if you take a career of 25 years, there are some times during the growth of the family when the savings are very low, other times when the children are grown up and gone away, when the savings are greater.

It has become something of a practice of Judges, faced with what is really a hopeless calculation to take a figure of 10% of post-trial income as representing what they think might have been saved by the deceased. And I will do that in this case, taking a figure of $24,000 which is about 10% of post-trial loss of $236,000, which makes the total $260,000.

Provident and Retirement Fund

I then have to deal with the Provident Fund. As I have concluded that the deceased would have reached Grade 9 before his retirement at 55, I will take the Grade 9 figure given by Mr. Syed Ahmad, $109,856 as the amount the deceased would have received from the fund at his death at 55. However, two-thirds of this is the deceased getting his own money back. The benefit from the additional benefit from his employer would have been one-third of this which is $36,600.

Some discount should be made for the fact that the widow will receive this as a lump sum now, rather than in 25 years' time. What I have decided to do, recognising that this is very rough and ready, is to discount the total by the same proportion as the multiplier bears to the period of the deceased's remaining years of work. The multiplier is 14, which is compensation for the loss of earnings for 25 years *i.e.* the multiplier is 56% of the working period. I will discount the Provident Fund by 2/5, so that the plaintiff will receive 60% of it. Discounting 2/5 from the $36,600 leaves $22,000. From this I have to deduct $9,150 already recei-

ved. Therefore, in round figures the award under this head is $13,000.

The Retirement Fund, Group 9, figure was $160,207. I will discount this by 2/5 in the same way. This leaves $96,160 of which $25,176 has already been paid. I will round that to $71,000.

To summarize the various amounts. The pre-trial figure is $23,200 + $2,750 funeral expenses which is $25,950 which I round up to $26,000.

Loss of expectation of life has been agreed at $5,000. That gives a total of $31,000 pre-trial loss.

The lost years calculation is $260,000 + $84,000 on the Provident and Retirement Fund which is $344,000. That gives a total of $375,000. From this must be deducted one-quarter, in view of my finding of the respective degrees of negligence. That means a deduction of $93,750 which leaves $281,250. There will be 6% interest from death to judgment on the pre-trial amount of $19,500; and 2% on the $3,750 for loss of expectation of life, from the writ to the judgment. No interest on the lost years award or on the Provident and Retirement Fund awards.

Plaintiff to have costs.

Amount to be paid within 21 days.

Order accordingly.

Solicitors : *Choo Chan & Wong; David Clidero & Co.*

GELAU ANAK PAENG v. LIM PHEK SAN & ORS.

[O.C.J. (Roberts C.J.), January 28 & 29, 1985]
[Kuala Belait – Suit No. 152 of 1984]

Employment – Worker injured – Common law duty of care to protect worker – Contributory negligence – Damages.

Tort – Negligence – Common law duty of care – Plaintiff, 29, a labourer – Right hand injured in roller of brickworks – Contributory negligence.

Damages – Right hand injured – Permanent loss of capacity of 16% – Apportionment of liability – Interest on award.

The plaintiff, an Iban aged 29 at time of accident on July 13, 1981, was employed by the defendant at the Andulau Brickworks as a labourer. He was instructed by the defendants to clean the rollers with a stick with the engine on not only the one where his hand was injured, but the other rollers which operated in the same or in other conveyor belts in the brickworks. The defendants did not dispute that the plaintiff was found with an injured hand caught in the roller but they contended that it was extremely difficult, if not impossible, for that roller to have been cleaned with a stick. The plaintiff was hospitalized for 17 days with a return for 3 days a week after his first release. There was a degree of loss of movement in the right wrist and a somewhat ugly scar. Such improvement as was likely in the wrist would already had taken place 3½ years after the accident. The specialist Dr. Nyun was of opinion that there had been a permanent loss of capacity of 16%. The average earnings of the plaintiff, both before and after the accident, seemed to be about $500 a month.

Held: (1) the common law duty of an employer is to take reasonable precautions to protect his workers against danger. He is not required to insure them and to protect them against all risks of any kind but he is obliged to provide a reasonably safe system of work and to take reasonable care for his employees;

(2) there is a breach of the employer's common law duty to take reasonable steps to protect his workers. The plaintiff himself showed a considerable degree of disregard for his own safety and was ¼ liable for the fault, while the defendants were ¾ liable;

(3) the awards are as follows: (a) $60 for special damages, (b) $10,000 for pain and suffering, (c) $14,400 for loss of earning capacity. A quarter has to be deducted from the total of $24,460, thus giving a net award of $18,345. There will be interest on special damages at 3% from date of accident till date of judgment, and at 6% on the award for pain, suffering and loss of amenities from date of service of writ to date of judgment. No interest is due on the award for loss of earning capacity. There will be interest at 6% on the total amount due to the plaintiff, starting 21 days from date of judgment. Costs to be taxed if not agreed.

CIVIL SUIT.

Daljit Singh Sandhu for the plaintiff.
S.P. Wong for the defendants.

Cur. Adv. Vult.